U.S. DISTRICT COURT
SOUTHERN DISTRICT TEXAS
FILED

AUG 30 2002 2:17pm

MICHAEL N. MILBY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PAMELA J. PASCHAL, Individually and as Independent Executrix of the Estate of Jeffrey S. Paschal, Deceased, and as next friend of KATHLEEN PASCHAL, a minor, JENNIFER PASCHAL; MARY ANN FASSNACHT, Individually and as Personal Representative of the Estate of Edward R. Fassnacht, Deceased, and as next friend of ANNA MARIE FASSNACHT, a minor and EDWARD FASSNACHT, a minor; ROBERT EDWARD FASSNACHT; DEBORAH LOUISE MALINSKY, Individually and as heir-at-law of David Rutherford, Deceased; AMY BRIDGES JACOBS, Individually and as Independent Executrix of the Estate of Shawn O. Jacobs; STEVE JACOBS; SHIRLEY CHOATE; SEAN PALYO; and JEREMY YAKLIN	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. C-02-312
KAYDON CORPORATION; THE ARMOLOY CORPORATION; ARMOLOY OF ILLINOIS, INC.; ARMOLOY OF CONNECTICUT, INC.; INVESTMENT HOLDINGS, INC.; and SIKORSKY AIRCRAFT CORPORATION	§	
Defendants.	§	

DEFENDANT KAYDON CORPORATION'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND

COMES NOW KAYDON CORPORATION, Defendant in the above entitled and numbered cause, and files this Response to Plaintiffs' Motion

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to Remand and in support thereof respectfully shows the Court the following:

I. BACKGROUND

1. On July 2, 2002, an action was commenced in the 28th Judicial District Court of the State of Texas in and for Nueces County, Texas, entitled PAMELA J. PASCHAL, Individually and as Independent Executrix of the Estate of JEFFREY S. PASCHAL, Deceased, and as next friend of KATHLEEN PASCHAL, a minor, JENNIFER PASCHAL; MARY ANN FASSNACHT, Individually and as Personal Representative of the Estate of EDWARD R. FASSNACHT, Deceased, and as next friend of ANNA MARIE FASSNACHT, a minor and EDWARD FASSNACHT, a minor; ROBERT EDWARD FASSNACHT; DEBORAH LOUISE MALINSKY, Individually and as heir-at-law of DAVID RUTHERFORD, Deceased; AMY BRIDGES JACOBS, Individually and as Independent Executrix of the Estate of SHAWN O. JACOBS; STEVE JACOBS; SHIRLEY CHOATE; SEAN PALYO; and JEREMY YAKLIN, Plaintiffs, v. KAYDON CORPORATION; THE ARMOLOY CORPORATION; ARMOLOY OF ILLINOIS, INC.; ARMOLOY OF CONNECTICUT, INC.; INVESTMENT HOLDINGS, INC.; and SIKORSKY AIRCRAFT CORPORATION, Defendants, Civil No. 02-3319-A.

2. On or about July 17, 2002, Defendant Kaydon Corporation filed the Notice of Removal of Action under 28 U.S.C. §1442(a)(1)

Federal Officer Removal Statute, in that this case raises issues subject to the Government Contractor Defense.

3. On or about August 14, 2002, Plaintiffs filed their Motion to Remand alleging that this Court does not have removal jurisdiction under Section 1442(a)(1).

4. Defendant would respectfully show this Court that Plaintiffs' Motion to Remand is without legal or factual merit and, therefore, should, in all things, be denied.

II. ARGUMENT AND AUTHORITIES

5. The Government Contractor Defense as established in *Boyle v. United Technologies Corporation*[1] and its progeny makes this case removable under 28 U.S.C. § 1442(a)(1). Defendant was acting under federal officers in designing, manufacturing and supplying bearings and/or other components for the MH-53E Sea Dragon Helicopter to the United States Military.

6. Plaintiffs allege that this statute does not authorize removal because Defendant's assertion that it is entitled to the Government Contractor Defense is insufficient to confer removal jurisdiction. Plaintiffs have misconstrued the jurisdiction statute and ignored the case law in this area. The U.S. Supreme

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[1] 487 U.S. 500 (1988).

Court has held that under Section 1442, suits against federal officers may be removed despite the non-federal cast of the complaint; the federal question element is met if the defense depends on federal law.[2] Furthermore, the Court stated that in order to qualify for removal an officer must raise both a colorable defense and establish the that suit is for an act under color of office.[3]

7. The Fifth Circuit has given full treatment to the question of removal under the Section 1442(a)(1) Federal Officer Removal Statute in the cases of *Miller v. Diamond Shamrock, et al.*[4] and *Winters v. Diamond Shamrock Chemical Co, et al.*[5] In the *Winters* case, the Court enumerated the three prong test which is used to determine whether Section 1442 removal is appropriate.[6] First, a defendant seeking removal under Section 1442 must demonstrate that they are "persons" within the meaning of the statute. Second, the defendant must demonstrate that a causal nexus exists between the defendant's actions, taken pursuant to a federal officer's directions and under color of federal office, and

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2 *Jefferson County, Alabama v. Acker*, 527 U.S.423, 430-31 (1999).

3 *Jefferson County, Alabama* at 431 (citing *Mesa v. California*, 489 U.S. 121, 139 (1989).

4 275 F3d 414 (5th Cir. 2001).

5 149 F.3d 387 (5th Cir. 1997).

6 *Id.* at 397.

the plaintiff's claims. Third, the defendant must assert a "colorable federal defense."

8. Defendant satisfies all three requirements listed above for removal under Section 1442. The Fifth Circuit has previously held, that corporate entities qualify as "persons" under Section 1442(a)(1).[7] Therefore, the first prong of the test is satisfied.

9. With regard to the second prong, as previously noted, Defendant was acting under the direction of federal officers in designing, manufacturing and supplying bearing assemblies to the U.S. Military. The Fifth Circuit has held that the statute's "color of federal office" requirement is neither "limited" nor "narrow", but should be afforded a broad reading so as not to frustrate the statute's underlying rationale.[8] The Court explained that the question to determine for the second prong analysis is whether the government specified the composition of the material or product at issue so as to supply the causal nexus between the federal officer's directions and the Plaintiff's claims. Clearly, in the case at bar the causal nexus exists as the specifications and design directives were being handed down and/or reviewed and approved by the federal officers under which Defendant was working.

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7 *Winters*, 149 F.3d at 398 (citing *International Primate Protection League, No. 93-3067,* at 2 (5th Cir. May 4, 1994)(unpublished opinion).

8 *Id. at* 398.

10. Finally, a colorable federal defense is present since the Government Contractor Defense affords Defendant a defense in this case. The U.S. Supreme Court has held that when a defendant asserts a colorable federal defense under Section 1442, it need not show that the defense is meritorious, but only whether there is a colorable claim to such a defense.[9] *Winters v. Diamond Shamrock, supra,* clearly establishes that Defendant's need not prove the asserted defense but need only articulate its "colorable" applicability to the Plaintiff's claims. The officer need not win his case before he can have it removed.[10]

11. The U.S. Supreme Court set out the test for immunity under the Government Contractor Defense in *Boyle*.[11] The Court wrote that "[l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[12]

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[9] *Mesa*, 489 U.S. at 128-29; *see Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969).

[10] *Winters* at 400, citing *Willingham*.

[11] 487 U.S. 500, 512 (1988).

[12] *Id.*

12. Defendant has alleged that it meets the requirements established in *Boyle*. Specifically, Defendant will show that it manufactured and supplied bearings to the U.S. Military in accordance with military procurement contracts which required adherence to government approved design specifications. See Exhibit "1", affidavit of Michael R. Purchase.

13. Defendant was acting under federal officers at all times in the design and manufacture of the equipment in question. The equipment provided to the military conformed to the specifications approved by the government, as indicated by the Department of Defense Form 250, Material Inspection and Receiving Report for this bearing.[13] Defendant's assertion of the Government Contractor Defense is certainly "colorable" for Section 1442 removal purposes in this case.

14. Plaintiffs also assert that the Government Contractor Defense does not apply in this case because they plead a manufacturing defect in that the bearings allegedly were not manufactured according to government specifications. The Fifth Circuit in *Bailey v. McDonnell Douglas Corporation*[14] discussed whether the "manufacturing defect" label precluded application of

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13 DD Form 250 attached to Exhibit "1", Purchase Affidavit, on which U.S. Government inspector certified bearing serial number 766 conformed to government specifications.

14 989 F.2d 794 (5th Cir. 1993).

the government contractor defense. The court recognized that the mere labeling of a defect as a "manufacturing defect" does not necessarily mean that it is not in compliance with government specifications and, thus, the "manufacturing defect" label on a claim does not preclude application of the government contractor defense.[15] Furthermore, the denomination of a claim as either a "manufacturing defect" or a "design defect" is a matter of state law and varies by state. In *Harduvel v. General Dynamics Corp.*, the Eleventh Circuit held that where under Florida law a presumption of a manufacturing defect arises when the product is destroyed in an accident, state law could not govern the applicability of the government contractor defense. It concluded that, despite its state law label, the claim was for a design defect for purposes of federal law.[16]

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiffs' Motion for Remand be denied, and for such other and further relief, both in law or equity to which it may show itself justly entitled to receive.

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15 *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 801 (5th Cir. 1993).

16 *Id.* at 801 (citing *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989)).

Respectfully submitted,

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By permission of
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Federal I.D. 32283

ATTORNEYS FOR DEFENDANT
KAYDON CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing pleading was delivered by facsimile, to:

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Mr. James A. Huguenard
Mr. Olan J. Boudreaux
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on this 30th day of August, 2002.

Ron A. Sprague by Richard B. Sorenson by permission
RON A. SPRAGUE
RICHARD B. SORENSON

r:ras\paschal\ans motion remand

IN THE UNITED STATES DISTRICT COURT
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CORPUS CHRISTI DIVISION

PAMELA J. PASCHAL, Individually and as Independent Executrix of the Estate of Jeffrey S. Paschal, Deceased, and as next friend of KATHLEEN PASCHAL, a minor, JENNIFER PASCHAL; MARY ANN FASSNACHT, Individually and as Personal Representative of the Estate of Edward R. Fassnacht, Deceased, and as next friend of ANNA MARIE FASSNACHT, a minor and EDWARD FASSNACHT, a minor; ROBERT EDWARD FASSNACHT; DEBORAH LOUISE MALINSKY, Individually and as heir-at-law of David Rutherford, Deceased; AMY BRIDGES JACOBS, Individually and as Independent Executrix of the Estate of Shawn O. Jacobs; STEVE JACOBS; SHIRLEY CHOATE; SEAN PALYO; and JEREMY YAKLIN	§	
Plaintiffs,	§	CIVIL ACTION NO. C-02-312
VS.	§	
KAYDON CORPORATION; THE ARMOLOY CORPORATION; ARMOLOY OF ILLINOIS, INC.; ARMOLOY OF CONNECTICUT, INC.; INVESTMENT HOLDINGS, INC.; and SIKORSKY AIRCRAFT CORPORATION	§	
Defendants.	§	

AFFIDAVIT OF MICHAEL R. PURCHASE

STATE OF MICHIGAN §
§
COUNTY OF MUSKEGON §

EXHIBIT "1"

BEFORE ME, the undersigned authority, on this day personally appeared Michael R. Purchase, and after being duly sworn by me stated as follows:

1. My name is Michael R. Purchase. I am over the age of eighteen and fully competent and authorized to make this Affidavit. The following facts and circumstances are within my personal knowledge, based upon my experiences and documents reviewed by me, and are true and correct.

2. I am currently Vice President Engineering for Kaydon Corporation Custom Bearings (hereinafter Kaydon), located at Muskegon, Michigan. I have been employed with Kaydon for approximately 20 years. In my current position I have considerable involvement with and responsibilities for the duplex bearing used in the swashplate assembly for the military MH-53E and CH-53E helicopter.

3. I am familiar with the design and manufacturing process of the duplex bearing used in the CH-53E and MH-53E helicopter swashplate assembly. Sikorsky Aircraft Corporation (hereinafter Sikorsky) provided the duplex bearing drawing to Kaydon that prescribes the design requirements for the bearing. Kaydon Corporation has no authority to deviate from this drawing without prior written authorization from Sikorsky.

4. After the May 9, 1996, CH-53E helicopter mishap at the Sikorsky Aircraft Corporation plant located in Stratford, Connecticut, numerous meetings occurred between Sikorsky and Kaydon employees to review the design requirements for bearing improvement. As a result of these meetings, Sikorsky established new design requirements for the swashplate duplex bearing. This resulted in the so-called second generation -043 swashplate duplex bearing manufactured according to Revision E of the Sikorsky drawing and Request To Engineering RTE 94367, RTE 93768, RTE 94894,and Engineering Order EO 50208, and EO 50210.

5. To the best of my knowledge, swashplate duplex bearing serial number 766 was the swashplate duplex bearing installed on the U.S. Navy MH-53E helicopter involved in the mishap on August 10, 2000 off the coast of Corpus Christi, Texas.

6. Kaydon was required by Sikorsky to use Armoloy of Illinois as the only approved source for the Thin Dense Chrome (TDC) plating applied to bearing serial number 766. Kaydon had no authority to use another source for TDC plating.

7. During the June 1996 to December of 1996 period, Kaydon's Muskegon facility, which manufactures the bearing, had numerous representatives from the U.S. Navy,

Defense Contract Management Command, and Sikorsky performing various inspection and review activities. Bearing serial number 766 was produced in accordance with the Sikorsky design changes and increased inspection criteria implemented over this time period.

8. Final inspection of duplex bearing serial number 766 was accepted by both the U.S. Government inspector and Sikorsky inspector. Both of these inspectors signed the Kaydon shipping document (packing slip), indicating inspection and acceptance of bearing serial number 766 meeting specifications. A true and correct copy of the packing slip maintained at Kaydon Corporation is attached to this affidavit.

9. The government inspector also on November 21, 1996 signed the Department of Defense Form 250, Material Inspection and Receiving Report, indicating the bearing at issue in this litigation conformed to contract specifications and accepted the bearing on behalf of the U.S. Government. A true and correct copy of the DD form 250 on file at Kaydon Corporation for bearing serial number 766 is attached to this affidavit.

10. I am not aware from my position in Kaydon Corporation of any instance in which Kaydon withheld design information regarding possible dangers of this bearing from the U.S. Navy or Sikorsky. To the contrary, Kaydon has identified areas that should be of concern to the Navy and Sikorsky to improve the performance of the swashplate duplex bearing and minimize risk of failure.

Subject to penalty of perjury, further Affiant sayeth not.

Michael R. Purchase

SUBSCRIBED AND SWORN TO BEFORE ME on this 29th day of August, 2002.

Notary Public State of Michigan

JEANETTE C. PALMER
Notary Public, Muskegon County, MI
My Commission Expires Jul. 11, 2006

No. 261689

MATERIAL INSPECTION AND RECEIVING REPORT

Form Approved
OMB No. 0704-0248

Public reporting burden for this collection of information is estimated to average 35 minutes per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0248), Washington, DC 20503.

1. PROC. INSTRUMENT IDEN. (CONTRACT)	(ORDER) NO.	6. INVOICE	7. PAGE	OF	8. ACCEPTANCE POINT
N00383-92-G-K311	1162		1	1	S

2. SHIPMENT NO.	3. DATE SHIPPED	4. B/L / TCN	5. DISCOUNT TERMS
STR0045	96NOV21E	330256964 TCN BURLINGTON AIR	NET CASH

9. PRIME CONTRACTOR CODE 78286
UNITED TECHNOLOGIES
SIKORSKY AIRCRAFT
Stratford, Connecticut 06601 U.S.A.

10. ADMINISTERED BY CODE S0707A
DCMC
SIKORSKY AIRCRAFT CORPORATION
P.O. BOX 9731
STRATFORD CT 06497-9131

11. SHIPPED FROM (if other than 9) CODE 32828 FOB:
KAYDON CORPORATION
2860 McCRACKEN STREET
MUSKEGON MI 49443

12. PAYMENT WILL BE MADE BY CODE SC1032
DFAS-COLUMBUS CENTER
ATTN: MINUTEMAN DIVISION
P.O. BOX 182266
COLUMBUS OH 43218-2266

13. SHIPPED TO CODE N65923
NADEP RECEIVING OFFICER
MARINE CORPS AIR STATION
CUNNINGHAM ST. BLDG 159 BAY R4
CHERRY POINT NC 28533-7058

14. MARKED FOR CODE

15. ITEM NO.	16. STOCK/PART NO. DESCRIPTION (Indicate number of shipping containers - type of container - container number.)	17. QUANTITY SHIP / REC'D*	18. UNIT	19. UNIT PRICE	20. AMOUNT
001 001	7RH3110-01-209-3087LU 65951-11563-043 BEARING	1	EA	$0.00	$0.00
	ACRN: AA S/N 766 GROSS SHIPPING WT. = 140 LBS.			TOTAL	$0.00

21. CONTRACT QUALITY ASSURANCE

A. ORIGIN
[X] CQA [X] ACCEPTANCE of listed items has been made by me or under my supervision and they conform to contract, except as noted herein or on supporting documents.

DATE: 96NOV21 SIGNATURE OF AUTH GOVT REP: [signature]
TYPED NAME AND OFFICE: CHARLES A. SMITH S2303A

B. DESTINATION
[ ] CQA [ ] ACCEPTANCE of listed items has been made by me or under my supervision and they conform to contract, except as noted herein or on supporting documents.

DATE SIGNATURE OF AUTH GOVT REP
TYPED NAME AND TITLE

22. RECEIVER'S USE
Quantites shown in column 17 were received in apparent good condition except as noted.

DATE RECEIVED SIGNATURE OF AUTH GOVT REP
TYPED NAME AND OFFICE

If quantity received by the Government is the same as quantity shipped, indicate by (✓) mark, if different, enter actual quantity received below quantity shipped and encircle.

23 CONTRACTOR USE ONLY

BOX NO	CONTAINER	DIMENSIONS LENGTH	WIDTH	HEIGHT	CUBIC	WEIGHTS GROSS	NET

(WHEN ENCLOSED WITH OR ATTACHED TO A SHIPMENT, THIS SHEET SERVES AS A PACKING LIST.)

CONTRACTORS CONTROL No. 261689

LONG 1ST SET

AT MUSKEGON, MICH 11/21 96

FROM	FROM
Turning Ideas Into Engineered Solutions KAYDON CUSTOM BEARINGS MUSKEGON, MICHIGAN 49443	Turning Ideas Into Engineered Solutions KAYDON CUSTOM BEARINGS MUSKEGON, MICHIGAN 49443
SOLD TO SIKORSKY AIRCRAFT ATTN: ACCTS PAYABLE M/S S432A P.O. BOX 9728 STRATFORD CT 064979128	SHIP TO SIKORSKY AIRCRAFT DIV UNITED TECHNOLOGIES CORP NORTH MAIN ST STRATFORD CT 06497
YOUR ITEM (S) 0008 YOUR ORDER NO. P7858199-0008	YOUR ITEM (S) 0008 YOUR ORDER NO. P7858199-0008

CUSTOMER CODE	TERR	TERMS OF SALE	PREPAID / PREPAID (BILL)	VIA	F.O.B MUSKEGON UNLESS SHOWN
7814	31	NET 30 DAYS	☐ / ☐	B/W	

SHIPMENT PARTIAL ☒ / SHIPMENT COMPLETE ☐	DATE SHIPPED	INVOICE DATE	INVOICE NO.	☐ CERT. TEST	☒ CERT. COMP. ☐ CERT. INSP.
	112196	112196	131517		

R T CONTRACT	GOVERNMENT CONTRACT NO	DPS RATING	PROP NO	S.O. DATE	S.O NO	☒ GOVT SOURCE ☒ CUST SOURCE
1 2	N00383-92-C-K311	DOA1	FTK	070296	61666	

ITEM	QUAN. ORDERED	QUAN. SHIPPED	PROD NO	KAYDON PART	CUSTOMER PART	REV	
01	41 EA	1	62	13707201	65951-11563043 *65951-11563	E	$7[redacted]

SERIAL# 766

DATE OF PRESERVATION - NOVEMBER 1996

REQUIRED PQA LISTED ITEMS HAS BEEN PERFORMED

Charles A. Smith

CHARLES A. SMITH S2303A

CERTIFICATE OF COMPLIANCE

We certify that these parts comply with all applicable drawings and specifications, and are substantiated with necessary data and/or records on file.

Quality Control Manager *[signature]* K 108

NO PKGS	KIND OF PACKAGE, DESCRIPTION OF ARTICLES, SPECIAL MARKS & EXCEPTIONS		WGHT SUB TO COR	CLASS OR RATE	CK COLL
1	BOXES ~~CARTONS~~	BEARINGS - BALL OR ROLLER N.O.I. - IRON OR STEEL	140		
	BOXES CARTONS	BALL OR ROLLER - BEARING PARTS - N.O.I. - IRON OR STEEL			
	CARTONS	BEARING - BALLS OR ROLLERS ANTI-FRICTION - N.O.I. - IRON OR STEEL			
	PALLETS	BEARING - BALL OR ROLLERS ANTI-FRICTION - N.O.I. - IRON OR STEEL			
	BURLINGTON AIR - 330256964				

SOURCE INSPECTED and ACCEPTED by *[signature]* SIGNATURE SIKORSKY 239 STAMP Sikorsky Aircraft SA-8260

KAYDON CUSTOM BEARINGS

Shipper Per MG Agent, Per

PERMANENT POST-OFFICE ADDRESS OF SHIPPER, MUSKEGON, MICH. 49443

FORM MC031 (6/93) PACKING SLIP SHIPPER NO. 131517

COPY

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PAMELA J. PASCHAL, Individually and as Independent Executrix of the Estate of Jeffrey S. Paschal, Deceased, and as next friend of KATHLEEN PASCHAL, a minor, JENNIFER PASCHAL; MARY ANN FASSNACHT, Individually and as Personal Representative of the Estate of Edward R. Fassnacht, Deceased, and as next friend of ANNA MARIE FASSNACHT, a minor and EDWARD FASSNACHT, a minor; ROBERT EDWARD FASSNACHT; DEBORAH LOUISE MALINSKY, Individually and as heir-at-law of David Rutherford, Deceased; AMY BRIDGES JACOBS, Individually and as Independent Executrix of the Estate of Shawn O. Jacobs; STEVE JACOBS; SHIRLEY CHOATE; SEAN PALYO; and JEREMY YAKLIN	§	
Plaintiffs,	§	
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KAYDON CORPORATION; THE ARMOLOY CORPORATION; ARMOLOY OF ILLINOIS, INC.; ARMOLOY OF CONNECTICUT, INC.; INVESTMENT HOLDINGS, INC.; and SIKORSKY AIRCRAFT CORPORATION	§	
Defendants.	§	

ORDER DENYING PLAINTIFFS' MOTION TO REMAND

On this the _______ day of __________, 2002 came on to be considered Plaintiffs' Motion for Remand and Defendant's Response to Plaintiffs' Motion for Remand. After reviewing Plaintiffs' Motion and Defendant's Response the Court is of the opinion that Plaintiffs' Motion should be denied;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Remand is hereby, in all things, DENIED.

____
Honorable Janis Graham Jack

r:\ras\paschal\ans to motion remand